Chel LaCort, Petitioner *and* Northeast, Western Pennsylvania and Ohio Department and Eastern Pennsylvania Department, International Ladies Garment Workers Union. Case 4–RM–1172

December 16, 1994

DECISION ON REVIEW

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

The issue in this case is whether the Employer-Petitioner timely withdrew from the multiemployer bargaining unit. On June 7, 1991, the Acting Regional Director issued a decision and order (pertinent portions are attached as an appendix) finding that the Employer's withdrawal was untimely under the rules set forth in *Retail Associates*, 120 NLRB 388 (1958), inasmuch as the Employer failed to give notice of withdrawal prior to commencement of the negotiations over a successor collective-bargaining agreement, and also failed to show any ''unusual circumstances'' that would permit its otherwise untimely withdrawal under those rules. Accordingly, the Acting Regional Director dismissed the Employer's petition.

On July 5, 1991, the Employer filed a request for review of the Acting Regional Director's decision and order with the Board. The Employer contended that the Acting Regional Director had erred in finding its withdrawal untimely under the rules in *Retail Associates* since the Employer and the general membership of the multiemployer association as a whole had not been informed of the initial meeting between the multiemployer association and the Union, which occurred several months prior to the deadline set in the contract for notification to reopen.[1]

By order dated January 23, 1992, the Board granted the Employer's request for review as it raised substantial issues warranting review. Thereafter, on May 23, 1994, the Board held oral argument concerning the application of the rules set forth in *Retail Associates*.[2]

The Board has considered the Acting Regional Director's decision in light of the record, request for review, oral arguments, and postargument briefs, and has decided to affirm the Acting Regional Director's decision and order for the reasons set forth therein.

In *Retail Associates*, the Board stated that, in accordance with the Act's fundamental purpose of fostering and maintaining stability of bargaining relationships, it would refuse to permit withdrawal of an employer or union from a duly established multiemployer bargaining unit, ''except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations.'' The Board further stated that ''where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.'' 120 NLRB at 395.

In agreement with the Union and most of the amici curiae who participated at the May 23, 1994 oral argument, we find that no modification to the 36-year old *Retail Associates* rules is necessary or warranted to address the issues raised by this case. We further find that the Acting Regional Director properly applied those rules to the facts here in finding that the Employer had failed to show any ''unusual circumstances'' within the meaning of *Retail Associates* justifying its otherwise untimely withdrawal. The ''unusual circumstances'' exception under *Retail Associates* has historically been limited to only the most extreme situations, such as where the withdrawing employer can establish that it is faced with dire economic circumstances, such as imminent bankruptcy, or when the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity.[3] Neither the Employer, nor our dissenting colleagues, cite any precedent which would support extending the ''unusual circumstances'' exception to situations where the multiemployer association fails, either deliberately or otherwise, to inform its employer-members of the start of negotiations.[4]

Nor do we think the ''unusual circumstances'' exception should be extended to such situations.[5] Wheth-

[1] The Employer also contended that the Acting Regional Director erred in finding that the initial meeting constituted the start of the negotiations.

[2] The Union and amici curiae AFL–CIO; Building and Construction Trades Department, AFL–CIO; International Longshoremen's Association, AFL–CIO; U.S. Chamber of Commerce; National Electrical Contractors Association, Inc.; and Associated General Contractors of America, Inc. participated in the oral argument in the instant case, and several of these also filed postargument briefs. The Employer did not participate in the oral argument or file a postargument brief. By letter dated May 4, 1994, counsel for the Employer notified the Board that the Employer would not participate in the oral argument, but would rely on its previous submissions to the Board.

[3] *Joseph J. Callier*, 243 NLRB 1114, 1117 (1979).

[4] *Acropolis Painting*, 272 NLRB 150 (1984), cited by the Employer, is clearly distinguishable as the parties there had expressly agreed to a specific period for withdrawal. Other cases, such as *Gary Jasper Enterprises*, 287 NLRB 746 (1987), are also distinguishable in our view. That case involved a peculiar bargaining history in which there had been a long hiatus since the association had last bargained on the employer's behalf, and the employer had been released from the predecessor contract several months prior to the commencement of negotiations. Unlike *Gary Jasper*, where the association unilaterally activated a dormant authority to bargain on behalf of the employer, this case simply presents an uninterrupted exercise of delegated bargaining authority by the Employer's designated agent.

[5] We note in this regard that there is no evidence in this case of collusion or conspiracy involving the Union. We leave to another

er and to what extent a multiemployer association communicates with its members is an internal association matter which is properly and readily resolved by and between the multiemployer association and its members. Were we to find ''unusual circumstances'' in cases of this kind where the multiemployer association fails to notify its members of the start of negotiations, we would effectively be imposing a notice requirement on the multiemployer association and inserting ourselves into the association/member relationship unnecessarily and with uncertain consequences.[6]

Finally, while we share the concern expressed in Member Cohen's dissent for the rights of employees, we do not agree that imposing a notice requirement on the multiemployer association would provide the employees of the individual employer-member with any greater protection. Whether an employer bargains individually or as part of a multiemployer unit has no direct impact on employees' Section 7 rights. While it may determine the scope of the appropriate unit in any representation election, the fact remains that the decision whether to join or remain in the multiemployer bargaining unit is made by the employer, not the employees, and without necessarily any regard for the employees' desires. Contrary to Member Cohen, we would not presume that the desires of an individual employer seeking to withdraw from a multiemployer unit are coextensive with its employees' desires in such circumstances.

Accordingly, the Acting Regional Director's decision and order is affirmed.

MEMBER STEPHENS, dissenting.

For many of the reasons set forth in Member Cohen's separate dissent, I join him in voting to reverse the Acting Regional Director's dismissal of the Employer's petition. The credited evidence establishes the deliberately covert manner in which the Association commenced ''actual bargaining negotiations,'' thereby depriving the Employer of a meaningful opportunity to timely withdraw from the multiemployer unit. On these facts, application of the ''unusual circumstances'' exception of the *Retail Associates* rule (120 NLRB 388 (1958) is neither an unwarranted nor an uncomfortable stretch.[1]

In applying that exception, I would not—as the majority suggests—simply be providing redress for an internal communications problem that would best be dealt with in civil lawsuits under state law governing private associations. Rather, I am seeking to protect the right of employers freely to choose whether they shall bargain individually or in a group. The legislative history of Section 8(b)(1)(B) of the Act reflects Congress' concern in this regard; and we properly take it into account in establishing the rules for determining when an employer will be regarded as having designated an association as its collective-bargaining representative and when and by what means it is free to withdraw that designation so far as obligations under the Act are affected. Establishment of such rules is clearly within the province of the Board. See *Acropolis Painting*, 272 NLRB 150, 154 (1984), and cases there cited.

At the same time, I am mindful of the policy of ''fostering and maintaining stability in bargaining relationships'' which underlies *Retail Associates*. I would not give to those employers who do not like the way negotiations seem to be shaping up the option of withdrawing simply by using the excuse of lack of express notice and inattentiveness to past bargaining practice. For that reason, it is critical to my decision here that the Association sent affirmatively misleading newsletters to its members indicating that, whatever might have been the practice in the past, negotiations had not yet begun and would not commence until after the Association members had met to formulate their position. In my view, this is truly an unusual case and therefore one for which the ''unusual circumstances'' exception is appropriate.

MEMBER COHEN, dissenting.

Like my colleagues, and as argued by the Union and most amici curiae at the May 23, 1994 oral argument in this case, I would apply the principles of *Retail Associates*, 120 NLRB 388 (1958), to the facts of this case. Thus, under *Retail Associates*, the Employer's withdrawal from the Atlantic Apparel Contractors Association (Association), after negotiations had begun with the Union for a successor contract, was untimely, unless there were ''unusual circumstances'' permitting

case to decide whether or when such evidence would be sufficient to show ''unusual circumstances.''

[6] Indeed, imposing such a notice requirement on the multiemployer association might actually have the effect of imposing such a requirement on the union, for the only way the union could be sure that such notice was given and that the employer-members would be bound would be to give such notice itself.

[1] Although the majority distinguishes it on factual grounds, *Gary Jasper Enterprises*, 287 NLRB 746 (1987), is not without relevance for several reasons. First, even though the Board did not use the rubric of the ''unusual circumstances'' exception, the case still demonstrates that the Board has not applied *Retail Associates* mechanically. Instead, the Board there adopted what has been described as a case-by-case approach whereby it takes into account unique facts and circumstances of a dispute. Secondly, *Gary Jasper Enterprises*, albeit without elaboration, indicates that ''[n]otification of the date set for bargaining is a prerequisite to 'timely' withdrawal,'' thus suggesting at the very least that the presence or absence of notice may be a factor to consider in the analysis. See *Action Electric v. Electrical Workers Local 292*, 856 F.2d 1062, 1066 (8th Cir. 1988), in which the court observed with respect to *Retail Associates* that ''recent Board cases [including *Gary Jasper Enterprises*] also indicate that a case-by-case approach taking into account all the relevant circumstances is necessary and appropriate to the resolution of disputes in this area and to balance the legitimate interests of stability and voluntariness.''

the withdrawal. Contrary to the majority, however, I find ''unusual circumstances'' in this case.

The following facts are undisputed. After the Employer commenced operations in 1985, it recognized the Union, joined the Association, and authorized the Association to bargain on its behalf as part of a multiemployer unit. Thereafter, the Employer became bound to the successor collective-bargaining agreement negotiated by the Union and the Association, effective from June 1, 1988, until May 31, 1991.

Under the 1988–1991 contract, if either the Union or the Association wished to modify its terms, that party was required to give written notice at least 60 days prior to the May 31, 1991 expiration date. Pursuant to this contractual requirement, the Union wrote the Association on December 10, 1990, seeking to modify the agreement and requesting a meeting in early January 1991.[1]

Subsequently, the Association and the Union agreed to meet on January 7, 1991.[2] The Association's board of directors was notified of the meeting, and, through it, about 25 to 30 Association members informally learned of the meeting. The Employer and the other 125 members did not. Indeed, the January 7 meeting was ''private,'' and the Association deliberately kept the meeting secret from its members. As the Association's executive director, Delin, explained:

> No, we don't tell them because you don't tell them those things. When you do . . . they'd be bothering you everyday.

Further, when pressed as to whether an employer who had been an Association member for 5 years would know that negotiations usually begin with a private meeting in January, Delin acknowledged that such an employer would not know.[3]

At the January 7 meeting, the Union submitted bargaining proposals to the Association. Thus, this meeting constituted the onset of negotiations. However, as discussed above, the Association deliberately concealed this meeting from the Employer. Further, the Association perpetuated this deception in subsequent communications with its members. Thus, on January 14, the Association wrote its members that a special meeting would be held February 4, to ''discuss the *upcoming* contract negotiations.'' (Emphasis supplied.) Similarly, in its February 4 newsletter to members, the Association repeated that the February 9 special meeting had been scheduled ''to discuss *upcoming* contract negotiations.'' (Emphasis supplied.) Neither the January 14 notice nor the February 4 newsletter mentioned the January 7 meeting.

Having received no indication that bargaining had commenced, the Employer wrote the Association and the Union on February 19 or 20 that it was withdrawing from the Association and rescinding the Association's authority to bargain on its behalf. The Association and Union received these letters on February 21 and 22, respectively. At the time of the attempted withdrawal, the only bargaining that had occurred was at the January 7 meeting which the Association had concealed from the Employer.

In these circumstances, where the onset of bargaining was intentionally withheld from the Employer, and the Employer would not otherwise have known that bargaining would begin in early January, I view the February withdrawal as privileged under the ''unusual circumstances'' exception in *Retail Associates*. The Act guarantees employees the right to choose, in an appropriate unit, whether they wish to be represented by a union. The appropriate unit is multiemployer wide only if the employer of the employees has clearly consented to be part of such a unit. In the instant case, the Employer has chosen precisely the opposite, i.e., it has chosen to be in a separate unit. But for the deception practiced by the Association, that decision would have been effectuated prior to the onset of negotiations. In these circumstances, I would not permit the Association's deception to frustrate the rights of the employees.

My colleagues suggest that I am imposing a ''notice'' requirement in all cases, i.e., a requirement that an association notify its members of any and all negotiations with the union. I am not imposing any such requirement. My decision is based on the narrow facts of this case. Those facts show, through the testimony of the executive director of the Association, that the Association deliberately kept members in the dark with respect to the holding of early negotiations.

My colleagues and the Union argue that the Association is the agent of the Employer, and thus the Employer's remedy is to proceed against its agent, the Association. However, the issue of concern to the Board in this case is not the business claims of employers vis-a-vis each other; rather it is the statutory rights of the employees under Section 7 and of the Employer under Section 8(b)(1)(B).

With respect to employee rights, my colleagues say that ''whether an employer bargains individually or as part of a multiemployer unit has no direct impact on employees' Section 7 rights.'' I disagree. The unit determination in this case has a direct impact on whether the Employer's employees will be able to decide for themselves whether they wish to be represented by a union.

[1] The Employer was not aware of the Union's letter.

[2] All subsequent dates are in 1991 unless noted.

[3] Consistent with Delin's testimony, the evidence indicates that the Employer was kept in the dark about the January negotiations in 1988. Thus, in March 1988, the Employer learned from Association members that negotiations were *about to begin* for a successor to the 1985–1988 contract.

Finally, my colleagues assert that I am presuming that the desires of the employees are the same as those of the Employer. I make no such presumption. I do not know the desires of the employees concerning the issue of whether the Employer should bargain in a multiemployer unit. That is a consensual decision for the Employer and the Union, and here the Employer has clearly chosen not to bargain in the multiemployer unit. Of greater importance is the desire of the Employer's employees on the issue of whether they wish to be represented by the Union. Again, I do not know their desires. I wish to conduct an election to ascertain their desires. Therefore, I dissent.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

The Employer is a partnership engaged in cutting textiles at its facility in Pen Argyl, Pennsylvania. The Employer's principal partners are Donald Cassiono and Fred C. DeRea. The Employer began operations in the fall of 1985. In about October or November 1985, the Employer voluntarily recognized the International Ladies' Garment Workers Union (ILGWU) as the bargaining representative of its employees. At approximately the same time, the Employer joined the Atlantic Apparel Contractors Association, Inc., which is a multiemployer trade association of employers in the garment industry. The Association and ILGWU have had a collective-bargaining relationship for about 15 years. The Association and ILGWU, on behalf of its affiliated locals located within the Northeast, western Pennsylvania and Ohio Department and the eastern Pennsylvania Region of ILGWU, were parties to a collective-bargaining agreement effective from June 1, 1988, until May 31, 1991. The Employer contends that although it was bound to the contract, it has withdrawn from the Association and is not bound to any contract reached between the Association and ILGWU as a result of their current negotiations. The Union contends that the Employer's request to withdraw from the Association was untimely and that the Employer remains part of the multiemployer bargaining unit and, therefore, the instant petition should be dismissed.

The Association's only contract is with ILGWU. In the past, ILGWU has asked the Association to begin negotiations for a new agreement in December or January before the existing contract expires, and for about the last 15 years, the parties' contract negotiations have begun in December or January every third year. In the last negotiations, ILGWU sent the Association a letter dated December 14, 1987, requesting negotiations for a new contract, and negotiations began in January 1988.

With respect to the current negotiations, ILGWU sent the Association a letter dated December 10, 1990, requesting that negotiations for a new contract begin and suggesting ''our first formal meeting'' be held on January 2, 3, 4, 7, or 8, 1991. On January 7, 1991, two Association representatives met with four ILGWU representatives. The parties' chief negotiators, the Association's executive director, Arnold Delin, and ILGWU Vice President Sol Hoffman, were present. The Association also was represented at the meeting by its president, Joseph Dell'Abba. At the meeting, ILGWU gave the Association a number of written proposals which the parties discussed, but no agreement was reached.

The Association has about 125 members from Pennsylvania and New Jersey and a 12-member board of directors. The board members knew in advance that the initial negotiation session was to be held on January 7, l991. Delin estimated at the hearing that 25 to 35 Association members knew of the meeting beforehand, including those who were informed by word of mouth. The general membership of the Association, including the Employer, however, was not informed that the initial bargaining session was being held on January 7, 1991. In general, members of the Association know from the past that negotiations begin at the same time of the year. The Employer has never asked the Association when it planned to start negotiations; it has not been an active participant in the Association's labor negotiations since it joined and did not participate in the current negotiations. The Employer has never attended the Association's board meetings and has not participated in any of its committees.

The Association's notice of special meeting dated January 14, 1991, and its newsletter dated February 4, 1991, which was distributed to all members of the Association, announced a membership meeting to be held on February 9, 1991, ''to discuss the upcoming contact negotiations.'' At the February 9, 1991 meeting, Delin discussed contract proposals that the ILGWU had already given to the Association on January 7. The Association did not give any other formal notification to its members about the January 7, 1991 negotiation session, although some members heard about it by word of mouth.

In early February 1991, the date for the second negotiation session between the Association and ILGWU was scheduled for March 25, 1991. Before the second session, Delin, Dell'Abba, and the board appointed five members to join them on the Association's labor committee for negotiations and a sixth member was added at his request. About the first week of February 1991, the Association's labor committee got copies of proposals presented by the ILGWU at the January 7, 1991 negotiation session.

On February 19 or 20, 1991, the Employer's managing partner, Fred C. DeRea, sent certified, undated letters to the Association and to the Union announcing its resignation from the Association ''retroactive to January 1, 1991,'' and stating that the Association was not authorized to negotiate with ILGWU on its behalf after May 31, 1991. The Employer thought that contract negotiations had not yet begun. The collective-bargaining agreement does not provide an agreed-upon procedure for an employer's withdrawal from multiemployer bargaining. Cf. *Acropolis Painting*, 272 NLRB 150 (1984). The Association received its letter on February 21, 1991, and the Union received its letter on February 22, 1991. By letter dated March 12, 1991, the Union informed DeRea that it rejected the Employer's withdrawal from the Association because it was untimely. The Association and ILGWU had additional negotiation sessions on March 25 and April 29, 1991.

The issue presented by this case is whether the Employer withdrew timely from the multiemployer unit. In *Retail Associates*, 120 NLRB 388 (1958), the Board set forth rules gov-

erning the withdrawal of an employer or a union from multiemployer bargaining. Prior to the beginning of negotiations, withdrawal can only be effected by an unequivocal written notice expressing a sincere intent to abandon, with relative permanency, the multiemployer unit, and to pursue negotiations on an individual employer basis. Once negotiations begin, withdrawal can only be effected on the basis of ''mutual consent'' or when ''unusual circumstances'' are present.

Here, the record establishes that bargaining commenced on January 7, 1991, and that ILGWU gave the Association contract proposals on that date. In *Carvel Co*., 226 NLRB 111, 112 (1976), enfd. 560 F.2d 1030 (1st Cir. 1977), the Board held that once proposals are given by one party to another, negotiations have commenced and a subsequent withdrawal by an employer from multiemployer bargaining is untimely. Further, the Employer's withdrawal was not effective because there was no mutual consent and the Employer has not shown any ''unusual circumstances.'' *Northern Petroleum Equipment Corp*., 244 NLRB 685, 687 (1979). When an employer's withdrawal is untimely, it remains part of the multiemployer unit. Accordingly, I find that the Employer is bound by the current negotiations, and I shall dismiss the Employer's petition. See *Elevator Sales & Service*, 278 NLRB 627, 632–633 (1986).